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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/654,571	09/01/2000	Christopher Morgan Rowden	ELAND.0001	6908
20987 7590 11/26/2007 VOLENTINE & WHITT PLLC ONE FREEDOM SQUARE 11951 FREEDOM DRIVE SUITE 1260 RESTON, VA 20190			EXAMINER PAPPAS, PETER	
			ART UNIT 2628	PAPER NUMBER
			MAIL DATE 11/26/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

**Office Action Summary**

Application No.

09/654,571

Applicant(s)

ROWDEN, CHRISTOPHER  
MORGAN

Examiner

Peter-Anthony Pappas

Art Unit

2628

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 10 September 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-16 and 18-21 is/are pending in the application.
- 4a) Of the above claim(s) 1-8 and 20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-16 and 18-21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 14 June 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Election/Restrictions***

1. Applicant's election with traverse of claims 9-16 and 18-20 in the reply filed on 12/14/06 is acknowledged. The traversal is on the ground(s) that the search and examination of the entire application can be made without serious burden. This is not found persuasive because the inventions have acquired a separate status in the art in view of their different classification as was stated in the Restriction mailed 11/17/06.

The requirement is still deemed proper and is therefore made FINAL.

### ***Response to Amendment***

2. The declaration filed on 9/10/07 under 37 CFR 1.131 has been considered but is ineffective to overcome the Broderbund reference.

3. The evidence submitted is insufficient to establish a conception of the invention prior to the effective date of the Broderbund reference. While conception is the mental part of the inventive act, it must be capable of proof, such as by demonstrative evidence or by a complete disclosure to another. Conception is more than a vague idea of how to solve a problem. The requisite means themselves and their interaction must also be comprehended. See *Mergenthaler v. Scudder*, 1897 C.D. 724, 81 O.G. 1417 (D.C. Cir. 1897).

4. The evidence submitted is insufficient to establish diligence from a date prior to the date of reduction to practice of the Broderbund reference to either a constructive reduction to practice or an actual reduction to practice. It is noted that the included letter references the title of the instant application. However, said letter refers to a

DRAFT which has not been produced. Therefore, a determination cannot be made as to whether the contents of the DRAFT support the disclosed invention.

5. Applicant is directed to the MPEP § 715.

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 9-11, 15, 16 and 21 are rejected under 35 U.S.C. 103(a) as being unpatentable over by Mykrantz (U.S. Patent No. 5, 246, 253) in view of Lanckton et al. (U.S. Patent No. 5, 517, 419).

8. In regard to claim 9 Mykrantz teaches garden planning aids and more specifically to a garden planning kit. Mykrantz teaches that it is desirable when planting a garden (e.g., a flower garden), to plan its appearance prior to engaging in the labor and expense of planting the garden. The selection of certain plants and their location in the garden depends to a significant degree upon the appearance of the plants during different times of the year (col. 1, lines 5-12).

Mykrantz teaches a worksheet 12 (landscape plan for a property) which has been imprinted with horizontally and vertically extending lines to form a grid 14, and an elongate, rectangular template 16 having the openings 18 in it in the shape of the top plan appearance of predetermined sizes of plants for drawing outlines of these plants on the worksheet 12 as they would appear from above the garden. In the preferred

embodiment, three openings 18 of different sizes are provided. The openings 18 have an irregular perimeter which simulates the top plan appearance of the perimeter of plants. The three sizes provided allow accurate representation of nearly all common garden plants (col. 1, lines 56-68; col. 2, lines 1-4). It is noted said openings 18, which have a respective perimeter, are considered to read on respective plant diameters.

Mykrantz teaches a first set 30 and a second set 32 of self-adhesive decals (symbols) are mounted on sheets of backing paper 36. Decals 30A of the first set 30 are representative of the green leafy portions of plants. However, it is to be understood that the decals 30A generally may represent the base, or lower portion of the plant, whether or not this portion is green or composed of leaves. The decals 30A generally have a color corresponding to the color of a particular type of plant represented, and are imprinted to depict leaves of different types of plants. In the preferred embodiment, decals 30A corresponding to the leafy portions of plants are provided in three different colors (leaf texture) and sizes, and five leaf types (e.g., corresponding to fern-like leaves, etc.). The second set of decals 32A have the color and shape of the blooms of plants. The decals 32A come in many different colors so that the flowers of nearly all types of blooming plants may be depicted (col. 2, lines 14-31).

Mykrantz teaches that said bloom decals 32A also come in different sizes and densities corresponding to the appearance of the blooms of various plant species. In the preferred embodiment, decals 32A of the second set come in seven colors, three sizes, five patterns (e.g., having a rose-like bloom, etc.), and two densities (col. 2, lines 38-43). A chart is again consulted to determine the decal 32A depicting appropriate

color, size, type and density of the bloom for the plants which bloom during a particular time of year (col. 2, lines 58-61). Mykrantz teaches that said decals are applied to said worksheet (Fig. 2).

However, Mykrantz fails to explicitly teach that the determination of locations for plants to be placed is in reference to at least one image of said property and a survey of said property. Lanckton et al. teaches surveying and photogrammetric methods of providing terrain data and more specifically a system for providing precise position data of terrain features quickly and for automatically imaging those features for engineering (e.g., civil engineering) purposes and remote sensing (col. 1, lines 6-10; col. 2, lines 24-26; col. 10, lines 21-44; col. 11, lines 1-10; 52-57). It is noted that civil engineering purposes is considered to include landscaping. It would have been obvious to one skilled in the art, at the time of the Applicant's invention, to incorporate the teachings of Lanckton et al. into the method taught by Mykrantz, because through such incorporation it would allow for a more accurate and realistic looking landscape plan to be generated via the use of data gathered and processed from the actual landscaping site itself.

9. In regard to claim 10 the rationale disclosed in the rejection of claim 9 is incorporated herein (Mykrantz – col. 1, lines 56-68; col. 2, lines 1-4). It is noted that plant width is considered to read on plant diameter.

10. In regard to claim 11 the rationale disclosed in the rejection of claim 1 is incorporated herein (Mykrantz – col. 2, lines 14-31).

11. In regard to claim 15 Mykrantz teaches a chart (legend) for identifying said symbols (Mykrantz – col. 2, lines 50-53, 58-61).

12. In regard to claim 16 the rationale disclosed in the rejection of claim 1 is incorporated herein (Mykrantz – col. 2, lines 14-31). It is noted a sheet containing said decals, which have a color corresponding to the color of a particular type of plant represented, is considered to read on a list of plants belonging to a specific plant category.

13. In regard to claim 21 Mykrantz and Lanckton et al. fail to explicitly teach determining the locations for said plants to be placed on said property in accordance with a list of desired landscape characteristics for the property provided by an owner of the property. Official Notice taken that both the concept and the advantages of allowing a given owner of a property to supply input for and design a landscape plan of said property are known and expected in the art. Thus, it would have been obvious to one skilled in the art, at the time of the Applicant's invention, allow an owner of a property to utilize the method taught by Mykrantz and Lanckton et al. to supply input for and design a landscape plan for their property, because it would allow said property owner to cut out the need for a "middle-man" and would allow said owner to maintain full control over how said landscape was developed. This would result in a more efficient and cost effective process.

14. Claims 12 and 13 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mykrantz (U.S. Patent No. 5, 246, 253) in view of Cronquist (An Integrated System of Classification of Flowering Plants).

15. In regard to claim 9 Mykrantz teaches garden planning aids and more specifically to a garden planning kit. Mykrantz teaches that it is desirable when planting a garden

(e.g., a flower garden), to plan its appearance prior to engaging in the labor and expense of planting the garden. The selection of certain plants and their location in the garden depends to a significant degree upon the appearance of the plants during different times of the year (col. 1, lines 5-12).

Mykrantz teaches a worksheet 12 (landscape plan for a property) which has been imprinted with horizontally and vertically extending lines to form a grid 14, and an elongate, rectangular template 16 having the openings 18 in it in the shape of the top plan appearance of predetermined sizes of plants for drawing outlines of these plants on the worksheet 12 as they would appear from above the garden. In the preferred embodiment, three openings 18 of different sizes are provided. The openings 18 have an irregular perimeter which simulates the top plan appearance of the perimeter of plants. The three sizes provided allow accurate representation of nearly all common garden plants (col. 1, lines 56-68; col. 2, lines 1-4). It is noted said openings 18, which have a respective perimeter, are considered to read on respective plant diameters.

Mykrantz teaches a first set 30 and a second set 32 of self-adhesive decals (symbols) are mounted on sheets of backing paper 36. Decals 30A of the first set 30 are representative of the green leafy portions of plants. However, it is to be understood that the decals 30A generally may represent the base, or lower portion of the plant, whether or not this portion is green or composed of leaves. The decals 30A generally have a color corresponding to the color of a particular type of plant represented, and are imprinted to depict leaves of different types of plants. In the preferred embodiment, decals 30A corresponding to the leafy portions of plants are provided in three different



colors (leaf texture) and sizes, and five leaf types (e.g., corresponding to fern-like leaves, etc.). The second set of decals 32A have the color and shape of the blooms of plants. The decals 32A come in many different colors so that the flowers of nearly all types of blooming plants may be depicted (col. 2, lines 14-31).

Mykrantz teaches that said bloom decals 32A also come in different sizes and densities corresponding to the appearance of the blooms of various plant species. In the preferred embodiment, decals 32A of the second set come in seven colors, three sizes, five patterns (e.g., having a rose-like bloom, etc.), and two densities (col. 2, lines 38-43). A chart is again consulted to determine the decal 32A depicting appropriate color, size, type and density of the bloom for the plants which bloom during a particular time of year (col. 2, lines 58-61). Mykrantz teaches that said decals are applied to said worksheet (Fig. 2).

As previously disclosed Mykrantz teaches that the selection of certain plants and their location in the garden depends to a significant degree upon the appearance of the plants during different times of the year (col. 1, lines 9-12). However, Mykrantz fails to explicitly teach the use of deciduous and evergreen plants or the use of respective plant categories for deciduous and evergreen plants. Cronquist teaches the classification of a subset of trees into two genera – Aesculus, with deciduous, and Billia, with evergreen (p. 800, ¶ 2). It would have been obvious to one skilled in the art, at the time of the Applicant's invention, to incorporate the use of deciduous and evergreen plants and the respective classifications of said plants into the method taught by Mykrantz, because by including said classification of deciduous and evergreen it would provide an easier to

understand classification of plants that either lose or maintain their leaves seasonally and as disclosed by Mykrantz the selection of certain plants and their location in the garden depends to a significant degree upon the appearance of the plants during different times of the year. Thus, through such incorporation the user of said landscaping system would be provided with more options which would allow them to plan out a landscape design with a greater degree of detail and accuracy.

16. In regard to claim 13 the rationale disclosed in the rejection of claim 12 is incorporated herein (Mykrantz – col. 2, lines 14-31).

17. Claims 14, 18 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mykrantz (U.S. Patent No. 5, 246, 253) and Lanckton et al. (U.S. Patent No. 5, 517, 419), as applied to claims 9-11, 15, 16 and 21, in view of Brimberg (U.S. Patent No. 4, 652, 239).

18. In regard to claim 14 Mykrantz and Lanckton et al. fail to explicitly teach utilizing hardscape material and symbols for said material in said landscape plan. Brimberg teaches that the present invention relates to space planning, such as the preparation of floor plans and furniture arrangements in buildings and the landscape planning of yards and the like (col. 1, lines 13-16, 25-31). Brimberg teaches utilizing hardscape material (e.g., fence) and symbols for said material in said landscape plan (col. 2, lines 22-26; col. 4, lines 64-68; col. 5, lines 1-3). It would have been obvious to one skilled in the art, at the time of the Applicant's invention, to incorporate the teachings of Brimberg with the teachings of Mykrantz, because through such incorporation it would provide additional structural and operational advantages over traditional space planning systems (col. 1,

lines 56-60), such as allowing for greater detail to be added through the addition of hardscape material.

19. In regard to claim 18 the rationale disclosed in the rejection of claim 14 is incorporated herein.

20. In regard to claim 19 the rationale disclosed in the rejection of claim 9 is incorporated herein.

### ***Response to Arguments***

21. The prior 35 U.S.C. 101 rejection has been withdrawn after further consideration.

22. In response to Applicant's remarks in regard to the date of the Broderbund (Total 3D Landscape Deluxe 3.0) reference and the webpages disclosed in Appendix A – Web Site Printout the previous rejection under Broderbund (Total 3D Landscape Deluxe 3.0) has been withdrawn. It is noted however that said Broderbund reference is given neither the 8/9/2000 date or the 10/6/200 date due to the conflicting evidence over its date of release.

23. In response to Applicant's remarks in regard to the restriction requirement it is noted that the MPEP § 808.02 discloses: that where the inventions as claimed are shown to be independent or distinct under the criteria of MPEP § 806.05(c) - § 806.06, the Examiner, in order to establish reasons for insisting upon restriction, must explain why there would be a serious burden on the Examiner if restriction is not required. Thus the Examiner must show by appropriate explanation one of the following: (A) Separate classification thereof: This shows that each invention has attained recognition in the art

as a separate subject for inventive effort, and also a separate field of search. Patents need not be cited to show separate classification.

24. In response to Applicant's remarks in regard to the newly amended language said remarks have been considered but are moot in view of the new ground(s) of rejection. Applicant is directed to the respective rejections above.

25. In response to Applicant's remarks in regard to claim 16 it is noted that the respective claim language fails to disclose that said list must conform a specific format (e.g., textual, graphical, etc.). Therefore, a plurality of displayed decals (e.g., plants), wherein each decals has a color corresponding to the color of a particular type of plant which is represented, is considered to read on a list of specific plants belonging to each generic plant category.

26. Applicant's remarks have been fully considered but are not persuasive. However, the Applicant is invited to contact the Examiner to discuss any issues pending in the instant application if the Applicant feels it might aid in any way.

### ***Conclusion***

27. The prior art made of record and not relied upon is considered pertinent to Applicant's disclosure: Doerr (U.S. Patent No. 5, 575, 107) teaches that the present invention provides an interactive display means with easy visual identification of varieties of plants and planting requirements for the particular plant (col. 1, lines 40-42). Doerr further teaches that the present invention permits the customer to easily identify appropriate locations for each plant with respect to the height, spread, bloom time, texture and color of the particular plant (col. 4, lines 2-5).

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Peter-Anthony Pappas whose telephone number is 571-272-7646. The examiner can normally be reached on M-F 9:00am-5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ulka Chauhan can be reached on 571-272-7782. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

PP

Peter-Anthony Pappas  
Examiner  
Art Unit 2628



KEE M. TUNG  
SUPERVISORY PATENT EXAMINER